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11
12 **UNITED STATES DISTRICT COURT**
 EASTERN DISTRICT OF WASHINGTON

13 LEVEL UP, LLC,

CASE NO. 4:19-cv-5213

14 Plaintiff,

**COMPLAINT FOR TRADEMARK
INFRINGEMENT AND UNFAIR
COMPETITION**

15 v.

DEMAND FOR JURY TRIAL

16 LEVEL UP BARCADE, INC.,

17 Defendant.

1 Plaintiff Level Up, LLC, by its attorneys, for its Complaint against Defendant,
2 alleges as follows:

3 **SUMMARY**

4 1. Plaintiff is an Oregon limited liability company based in Eugene,
5 Oregon, that was incorporated more seven years ago in 2012.

6 2. Plaintiff obtained the trademark rights to LEVEL UP for entertainment
7 and gaming services in the nature of amusement arcades, bar and cocktail services,
8 and restaurant services, in 2012 when it began offering its services in Eugene,
9 Oregon.

10 3. Since that time, Plaintiff's reputation and use of LEVEL UP has only
11 grown.

12 4. Indeed, Plaintiff's mark for its services has been featured in national
13 media many times since 2012.

14 5. To protect its valuable LEVEL UP trademark, Plaintiff filed United
15 States Trademark Application No. 87318967 for LEVEL UP for "entertainment and
16 gaming services in the nature of amusement arcades and bar and cocktail services;
17 and restaurant services" on January 21, 2017. Plaintiff obtained Federal Trademark
18 Registration No. 5700182, issued March 19, 2019, for the trademark mark LEVEL
19 UP for:

20 entertainment and gaming services in the nature of amusement arcades
21 and excluding entertainment and gaming services offered in facilities
22 that offer and provide casino gaming services, all identified services
23 limited to the states of Oregon, Washington, and Idaho and that portion
24 of the State of California north of 37 degrees latitude and bar and
cocktail services; and restaurant services offered only in facilities that
do not offer and provide casino gaming services, all identified services
limited to the states of Oregon, Washington, and Idaho and that portion
of the State of California north of 37 degrees latitude.

1 The exclusions in the registration are due to another user in Las Vegas,
2 Nevada, but Defendant is squarely within the zone of Plaintiff's registered rights,
3 which cover Kennewick. Exhibit 1 is a copy of the Certificate of Registration for
4 Plaintiff's Federal Trademark Registration No. 5700182.

5 6. Defendant, Level Up Barcade, Inc., opened a business under the mark
6 LEVEL UP offering entertainment and gaming services in the nature of amusement
7 arcades, bar and cocktail services, and restaurant services in Kennewick,
8 Washington, on information and belief, on or about April 1, 2019.

9 7. Plaintiff received phone calls and Facebook messages from confused
10 consumers who are believed to have mistakenly believed that the LEVEL UP
11 branded location opened by Defendant was Plaintiff's.

12 8. Plaintiff has requested that Defendant stop using LEVEL UP in
13 connection with entertainment and gaming services in the nature of amusement
14 arcades, bar and cocktail services, and restaurant services. But, Defendant has not
15 agreed to stop.

16 9. Thus, Plaintiff brings this action for trademark infringement and unfair
17 competition. By this action, Plaintiff seeks to prevent Defendant from using LEVEL
18 UP in connection with entertainment and gaming services in the nature of
19 amusement arcades, bar and cocktail services, and restaurant services and seeks: (a)
20 damages arising from Defendant's past and present infringement of Plaintiff's
21 trademark rights; (b) injunctive relief against Defendant's continued infringement;
22 (c) enhanced damages; and (d) reimbursement of Plaintiff's attorney fees and costs
23 incurred in connection with its efforts to protect its intellectual property rights.

THE PARTIES

10. Plaintiff, Level Up, LLC, is an Oregon limited liability company with a place of business in Eugene, Oregon.

11. Defendant, Level Up Barcade, Inc., is a Washington Corporation with a principal office at 4836 Ava Way, Richland, Washington, 99352-4586 that operates a bar/restaurant/arcade at 1022 N. Columbia Center Blvd., Suite 210, Kennewick, Washington.

12. Defendant does business as Level Up Arcade Bar.

PLAINTIFF'S TRADEMARKS

13. Plaintiff has been using the trademark LEVEL UP for entertainment and gaming services in the nature of amusement arcades, bar and cocktail services, and restaurant services since at least as early as 2012.

14. Plaintiff's use of LEVEL UP for entertainment and gaming services in the nature of amusement arcades, bar and cocktail services, and restaurant services has caused the trademark LEVEL UP to become Plaintiff's trademark wherever it has used LEVEL UP and in areas where the reputation of LEVEL UP is attributed to Plaintiff.

15. Plaintiff has used its mark LEVEL UP extensively from its location in Eugene, Oregon, and its goodwill extends to many other locations, including into Washington, and particularly to Kennewick.

16. Plaintiff also owns Federal Trademark Registration No. 5700182 for LEVEL UP for “entertainment and gaming services in the nature of amusement arcades and bar and cocktail services; and restaurant services” the application for

which was filed on January 21, 2017. Federal Trademark Registration No. 5700182
issued March 19, 2019. Exhibit 1.

3 17. Plaintiff's Federal Registration for its LEVEL UP trademark provides
4 rights in that trademark as of the January 21, 2017, filing date of the application
5 corresponding to Federal Trademark Registration No. 5700182 in the states of
6 Oregon, Washington, and Idaho, and that portion of the State of California north of
7 37 degrees latitude (excluding entertainment and gaming services offered in
8 facilities that offer and provide casino gaming services, and covering restaurant
9 services offered only in facilities that do not offer and provide casino gaming
10 services).

JURISDICTION AND VENUE

12 18. This Court has jurisdiction over the subject matter of this action because
13 this action arises under the Federal Trademark Act, 15 U.S.C. §§ 1051-1127,
14 jurisdiction being conferred in accordance with 15 U.S.C. § 1121 and 28 U.S.C. §§
15 1331 and 1338. Supplemental jurisdiction over the cause of action under Washington
16 state law is proper as that cause of action is substantially related to the causes of action
17 over which the Court has original jurisdiction, pursuant to 28 U.S.C. §§ 1338(b) and
18 1367.

19 19. Venue is proper under 28 U.S.C. §§ 1391(b). Defendant is transacting
20 business within this judicial district and has committed acts complained of herein in
21 this judicial district.

DEFENDANT'S INFRINGEMENT

23 20. Defendant operates an arcade at 1022 N. Columbia Center Blvd., Suite
24 210, Kennewick, Washington.

1 21. Defendant operates a bar at 1022 N. Columbia Center Blvd., Suite 210,
2 Kennewick, Washington.

3 22. Defendant operates a restaurant at 1022 N. Columbia Center Blvd.,
4 Suite 210, Kennewick, Washington.

5 23. Defendant offers entertainment services at 1022 N. Columbia Center
6 Blvd., Suite 210, Kennewick, Washington.

7 24. Defendant offers arcade services at 1022 N. Columbia Center Blvd.,
8 Suite 210, Kennewick, Washington.

9 25. Defendant offers restaurant services at 1022 N. Columbia Center Blvd.,
10 Suite 210, Kennewick, Washington.

11 26. Defendant offers bar services at 1022 N. Columbia Center Blvd., Suite
12 210, Kennewick, Washington.

13 27. Defendant's entertainment, arcade, restaurant, and bar services are
14 offered in connection with the trademark LEVEL UP.

15 28. Attached as Exhibit 2 is a true and correct copy of an example of
16 Defendant's use of LEVEL UP from Defendant's Facebook page, last accessed
17 July 31, 2019.

18 29. Defendant has been aware of Plaintiff's trademark for LEVEL UP since
19 at least as early as April 2019.

20 30. Defendant received a copy of Plaintiff's letter attached as Exhibit 3 on
21 April 5, 2019.

22 31. Defendant received a copy of Plaintiff's letter attached as Exhibit 4 on
23 May 1, 2019.

32. Defendant has refused to stop using LEVEL UP as a trademark for arcade and bar/restaurant services.

33. Defendant's use of LEVEL UP causes irreparable damage to Plaintiff at least in that the goodwill in Plaintiff's LEVEL UP trademark is being diminished.

34. Despite being aware of Plaintiff's federally registered LEVEL UP trademark and being asked to stop use, Defendant has continued to use LEVEL UP.

35. Defendant's continued use of LEVEL UP is likely to cause further damage to Plaintiff's goodwill in its trademark and lost sales due to confused consumers.

36. Defendant's continued use of LEVEL UP despite its awareness of Plaintiff's Federal Registration is extraordinary.

CLAIM ONE

FEDERAL TRADEMARK INFRINGEMENT

THROUGH USE OF LEVEL UP

37. Plaintiff repeats and realleges each and every allegation contained in the above paragraphs of this Complaint as though fully set forth herein.

38. Federal Law prohibits the “use in commerce [of] any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114(1)(a).

39. Defendant uses LEVEL UP in connection with the sale, offering for sale, distribution, and/or advertising of arcade services and bar and restaurant services, in commerce.

40. LEVEL UP is identical to Plaintiff's registered trademark LEVEL UP.

41. Consumers are likely to be confused as to the source or origin of Defendant's arcade services and bar and restaurant services marked with LEVEL UP and Plaintiff's trademark LEVEL UP.

42. Defendant's use of LEVEL UP causes irreparable damage to Plaintiff at least in that the goodwill in Plaintiff's LEVEL UP trademark is diminished.

43. Despite being aware of Plaintiff's federally registered LEVEL UP trademark, Defendant has continued to use LEVEL UP.

44. Defendant's continued use of LEVEL UP is likely to cause further damage to Plaintiff's goodwill in its trademark and lost sales due to confused consumers.

45. Defendant's continued use of LEVEL UP despite its awareness of Plaintiff's Federal Registration is extraordinary.

46. Defendant's use of LEVEL UP infringes Plaintiff's trademark rights in its federally registered LEVEL UP trademark and violates 15 U.S.C. § 1114(1)(a).

CLAIM TWO

FEDERAL UNFAIR COMPETITION THROUGH USE OF LEVEL UP

47. Plaintiff repeats and realleges each and every allegation contained in the above paragraphs of this Complaint as though fully set forth herein.

48. Federal Law prohibits the use in commerce in connection with any goods or services “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his

1 or her goods, services, or commercial activities by another person" 15 U.S.C. §
2 1125(a).

3 49. Defendant's use of LEVEL UP is likely to cause confusion, or to cause
mistake, or to deceive as to the affiliation, connection, or association of Defendant
5 with Plaintiff and/or Defendant's services with Plaintiff.

6 50. Defendant's use of LEVEL UP causes irreparable damage to Plaintiff
7 at least in that the goodwill in Plaintiff's LEVEL UP trademark is being diminished.

8 51. Despite being aware of Plaintiff's federally registered LEVEL UP
9 trademark, Defendant has continued to use LEVEL UP.

10 52. Defendant's continued use of LEVEL UP is likely to cause further
11 damage to Plaintiff's goodwill in its trademark and lost sales due to confused
12 consumers.

13 53. Defendant's continued to use of LEVEL UP despite its awareness of
14 Plaintiff's Federal Registration is extraordinary.

15 **CLAIM THREE**

16 **WASHINGTON STATE TRADEMARK INFRINGEMENT**
THROUGH USE OF LEVEL UP

17 54. Plaintiff repeats and realleges each and every allegation contained in
18 the above paragraphs of this Complaint as though fully set forth herein

19 55. Plaintiff has used its LEVEL UP trademark in Washington.

20 56. Plaintiff has promoted its LEVEL UP trademark in Washington.

21 57. Defendant's use of LEVEL UP is likely to cause confusion, or to cause
22 mistake, or to deceive as to the affiliation, connection, or association of Defendant
23 with Plaintiff.

58. Defendant's use of LEVEL UP causes irreparable damage to Plaintiff at least in that the goodwill in Plaintiff's LEVEL UP marks is diminished.

59. Despite being aware of Plaintiff's LEVEL UP trademark Defendant has continued to use LEVEL UP.

60. Defendant's continued use of LEVEL UP is likely to cause further damage to Plaintiff's goodwill in its trademark and lost sales due to confused consumers.

61. Defendant's continued use of LEVEL UP despite its awareness of Plaintiff's trademark is extraordinary.

62. The acts of Defendant constitute trademark infringement in violation Washington common law.

DEMAND FOR JURY TRIAL

63. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff requests a trial by jury on all issues properly triable by a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

A. The Court find that Plaintiff owns valid and subsisting rights in its LEVEL UP trademark.

B. Defendant be held liable under each claim set forth in this Complaint;

C. Defendant's trademark infringement be found exceptional;

D. The Court grant a permanent injunction against Defendant enjoining it
its agents, servants, employees, attorneys, and all other persons in active concert
participation with it (including subsidiaries and affiliates) from using LEVEL UP
ever spelled or punctuated, whether capitalized, abbreviated, singular or

1 plural, printed or stylized, whether alone or with any other word(s), punctuation or
2 symbol(s), and whether used in caption, text, orally, or otherwise), or any other
3 reproduction, counterfeit, copy, colorable imitation, or confusingly similar variation
4 of the LEVEL UP trademark as a trademark or service trademark, trade name,
5 business name, domain name, or in advertising, distribution, sale, or offering for
6 sale of any entertainment service or any restaurant or bar service and from doing
7 any other act that would likely cause confusion that Plaintiff is the source or, or
8 sponsor of, Defendant's goods, services, business, or commercial activities;

9 E. The Court Order as part of the injunction and pursuant to 15 U.S.C.
10 § 1116(a) that Defendant file with the Court and serve on Plaintiff within 30 days
11 after service on the Defendant of the injunction, a report in writing under oath
12 setting forth in detail the manner and form in which Defendant has complied with
13 the injunction;

14 F. Defendant be required to pay to Plaintiff compensatory damages
15 resulting from Defendant's actions, together with interest and costs, including
16 enhanced damages, pursuant to at least 15 U.S.C. § 1117(a)-(d);

17 G. Defendant be required to pay to Plaintiff profits made in connection
18 with its use of the LEVEL UP trademark, pursuant to 15 U.S.C. 1117 and the equity
19 powers of this Court;

20 H. Defendant be required to pay Plaintiff damages in an amount to be
21 determined at trial to allow Plaintiff to make corrective advertising;

22 I. Defendant be required to pay Plaintiff its costs, disbursements, and
23 reasonable attorneys' fees incurred in this action, together with interest, including

1 prejudgment interest, pursuant at least to 15 U.S.C. § 1117(a), and the equity powers
2 of this Court; and

3 J. Such other and further relief as may be deemed just and appropriate.

4
5 DATED this 19th day of August, 2019.
6

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